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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM W. EVANS,

Petitioner,

v.

UNITED ARAB SHIPPING COMPANY S.A.G.; M/V AL WATTYAH, her engines, boilers, etc., in rem,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in its reversal of the district court, which found that the petitioner, a state-licensed vessel pilot, had the requisite "employment related connection" to the vessel being piloted to be entitled to the protection of the Jones Act, 46 U.S.C. app. § 688(a)?

2. What is the nature and scope of the "employment related connection to a vessel in navigation" that is required in order to invoke the Jones Act?

3. If maritime workers on U.S. navigable waters are to be placed into one of only two categories, *i.e.*, Jones Act seamen or longshore/harbor workers, into which category should the pilot, the "quintessential seaman", be placed?

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THE OPINIONS BELOW

The opinion of a panel of the U.S. Court of Appeals for the Third Circuit in *Evans v. United Arab Shipping Company S.A.G. and M/V Al Wattyah* is reported at 4 F.3d 207 (3d Cir. 1993) and appears in the Appendix beginning at A-1. The dissenting opinion of Judge Nygaard begins at A-23. The Findings of Fact and Conclusions of Law issued by Judge Stanley S. Brotman

of the U.S. District Court for the District of New Jersey on July 30, 1991, are reported at 767 F.Supp. 1284 (D.N.J. 1991) and appear in the Appendix beginning at A-30.[1]

JURISDICTION

The decision and judgment of the U.S. Court of Appeals for the Third Circuit was rendered on August 13, 1993. The court of appeals denied petitioner's application for rehearing by its Order entered September 22, 1993. (A-53). The jurisdiction of the Supreme Court to review the judgment of the court of appeals is conferred upon the Court by 28 U.S.C. § 1254.

STATUTES INVOLVED

46 U.S.C. app. § 688(a)
33 U.S.C. §§ 902, 905
Delaware Code Ann. tit. 23, § 121 (1987)

STATEMENT OF THE CASE

Petitioner William W. Evans, a vessel pilot licensed by the State of Delaware and the U.S. Coast Guard, brought this action in the United States District Court for the District of New Jersey pursuant to the general maritime law and the Jones Act, 46 U.S.C. app. § 688(a). The jurisdiction of the district court was founded on 28 U.S.C. § 1333 and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330. Petitioner sought recovery for personal injuries sustained as a result of the negligence of the defendant, United Arab Shipping Company, as well as of the unseaworthiness of defendant's vessel. The district court held that petitioner was covered by the Jones Act, concluding that a river pilot was a "seaman" and that the petitioner had a sufficient

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1. A related opinion of the district court, not ruled upon by the court of appeals and not a subject of this petition, is reported at 790 F. Supp. 516 (D.N.J. 1992).

employment-related connection to the subject vessel at the time of his injury. (A-43).[2]

The district court found as a fact that the negligence of the defendant proximately caused an aggravation of petitioner's preexisting neurological condition. (A-48). However, its finding was specifically premised upon the lightened burden of proof as to causation to which Jones Act plaintiffs are entitled. Pilot Evans appealed the district court's assignment of the burden of proof on the aggravation issue and United Arab Shipping Company cross-appealed the district court's determination that petitioner was entitled to the protections of the Jones Act.

The U.S. Court of Appeals for the Third Circuit reversed the district court's finding that Pilot Evans was entitled to the protection of the Jones Act, which had the effect of avoiding the review of the district court's burden of proof assignment. (A-3). Circuit Judge Nygaard dissented. (A-23).

The court of appeals' opinion and judgment were entered on August 13, 1993. William Evans submitted a petition for rehearing, which was denied by the court of appeals on September 22, 1993. (A-53).

This Petition for a Writ of *Certiorari* followed.

REASONS FOR GRANTING THE WRIT

1. The personal injury remedies of a vital category of seaman, the vessel pilot, have been left in a state of confusion by the split among the circuits.

The petitioner in this case was a state-licensed pilot, serving the ports on the waters of the Delaware Bay and

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2. However, the district court concluded that it was petitioner's burden to prove the extent to which his shipboard accident had aggravated a preexisting neurological condition and ultimately refused to award damages for aggravation of this condition. The issue of the assignment of the burden of proof to the plaintiff was appealed to, but not decided by, the court of appeals. (A-3, 29).

River and its tributaries. He was specially trained and licensed under the laws of the State of Delaware to guide large commercial vessels between the Atlantic Ocean and their destinations. Many of these vessels were fully-laden tank ships which call at the refineries in the Delaware Valley region.

There are more than 1,000 state-licensed pilots in the United States. There are also a significant number of federally-licensed pilots who work exclusively aboard U.S. flag vessels in coastwise commerce. Each of these individuals is specially qualified to navigate a vessel during the most hazardous portion of its journey, while in the confined and congested waters of our ports, bays and rivers. The pilot's job is strictly one of navigation, so in that sense, he or she is the quintessential seaman. As Justice Curtis wrote in *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299 (1852):

> Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies the most important and responsible place among those thus engaged.

53 U.S. at 316.

In *Ex Parte McNeil,* Justice Swayne wrote that pilots were:

> as much a part of the commercial marine as the hull of the ship and the helm by which it is guided . . . Pilots are a meritorious class, and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places and ready to perform the duties of their vocation.

80 U.S. (13 Wall.) 624, 625 (1871).

The question presented in this appeal is whether or not this vital class of mariner is entitled to the remedies provided by the Jones Act, 46 U.S.C. app. § 688(a), as against the owner/operator of the vessel which has employed him. In attempting to fashion an answer to this question, the lower courts, including the Courts of Appeals for the Third, Fourth, Fifth and Ninth Circuits, have left the law in a confused state. It is important that this Court seize the current opportunity to set out a uniform rule defining the personal injury rights and remedies to which the members of this critical class of mariner are entitled. As will be explained below (Reason #2), this case also offers a perfect opportunity to provide guidance and, perhaps, to definitively answer what may be the last remaining general question regarding Jones Act entitlement: the exact nature and scope of the requisite worker/vessel connection.

The courts which have to date been asked to define the pilot's personal injury remedies have steered variant analytical courses. Moreover, in several important respects, these courts have reached different destinations. In the case at bar, for example, the district court relied upon this Court's decision in *McDermott International, Inc. v. Wilander,* 498 U.S. 337 (1991), in finding that, given the essential role played by the pilot in the safe navigation of a vessel and his receipt of remuneration for his services, the petitioner was a "seaman" with a sufficient "employment-related connection" to the defendant's vessel to be entitled to Jones Act remedies.[3]

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3. It was significant to the district court that, according to the *McDermott* decision, a maritime worker who has been excluded from receiving benefits under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-905 *et seq.*) ("LHWCA") as being a "master or member of the crew of a vessel" was, by definition, entitled to Jones Act seaman's status, (A-41), citing *McDermott,* 498 U.S. at 349. And, as the district court pointed out, an early but vital decision of the federal Employee's Compensation Commission had determined that pilots were, indeed, excluded

The Third Circuit Court of Appeals took a different analytical tack in the course of reversing that decision. The Third Circuit acknowledged that under its precedents a person who "performs the core function of a seaman aboard a vessel in navigation", might not need a permanent connection to the vessel. (A-13 n.7). However, the panel majority[4] paradoxically held that:

> "[b]ecause we conclude a compulsory river pilot such as Evans is not an employee of the vessel he pilots, *he would be unable to recover under the Jones Act even if he is a seaman.*"

(A-13) (emphasis added).

Despite the fact that Pilot Evans was hired by the vessel owner, was paid for his navigation services, and was injured in the course of his employment while debarking from the ship, the Third Circuit overturned the district court's finding of a sufficient "employment-related connection". (A-15). Contrary to the specific pronouncement of this Court, the Third Circuit demanded a strict "employer/employee" relationship as defined by common law rules of vicarious liability. (A-15). [5] The Third Circuit noted that under Delaware law the defendant was obliged to receive a pilot citing Del. Code Ann. tit. 23, § 1211. (A-16). The court then cited the decision in *Homer Ramsdell Transportation Co. v. La Compagnie*

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from LHWCA benefits because they were "masters or members of a crew", (A-42), citing *Longshoremen's Act,* Opinion #22, 1928 AMC 263 (U.S. Employee Comp. Comm'n 1927).

4. Circuit Judge Richard L. Nygaard wrote a dissenting opinion. (A-23).

5. This was in direct contravention of the decision in *Cosmopolitan Shipping Co. v. McAllister,* 337 U.S. 783 (1949), which held that "Congress intended that the purposes of [FELA and the Jones Act] should not be restricted by common-law concepts of control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality part of the processes and dependent upon the businesses to which they rendered service." 337 U.S. at 790.

Generale Transatlantique, 182 U.S. 406 (1901), which had held that a shipowner was not liable *in personam* for the negligence of a compulsory pilot because of a lack of discretion in selection of the individual. Applying the *Homer Ramsdell* reasoning, the Third Circuit decided that, although a compulsory pilot may well be a "seaman", injuries occurring to him while aboard ship do not occur "in the course of his employ", in a Jones Act sense.[6]

The Fifth Circuit Court of Appeals has approached the identical issue in an altogether different fashion. Refusing to make an exception due to the nature of the pilot's shipboard work, and without raising any issue pertaining to employer/employee control, the Fifth Circuit in *Bach v. Trident Steamship Co.,* 920 F.2d 322 (5th Cir.), *vacated and remanded*, 499 U.S.___, 111 S. Ct. 2253, *aff'd*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 504 U.S.___, 112 S.Ct. 1996 (1992), held that a pilot does not qualify as a Jones Act seaman because he is not permanently attached to a vessel or a particular fleet of vessels. *Bach,* 920 F.2d at 326. However, as the late Judge John Brown pointed out in dissent, the permanent attachment prong of the Fifth Circuit's Jones Act entitlement test arose to cope with suits brought by persons employed in the offshore oil industry whose job descriptions were not comparable to those of the personnel engaged aboard traditional vessels. *Bach,* 920 F.2d at 333 (Brown, J., dissenting). Thus, the *Bach* case yields

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6. Of course the approach taken by the Third Circuit overlooks the import of this Court's decision in *The CHINA,* 74 U.S. (7 Wall.) 53 (1868), entirely. In that case it was held that the ship *in rem* is vicariously liable for the acts of its compulsory pilot. The state statute at issue and the amount of actual control exercisable by the master over the pilot was in all relevant respects identical to those factors present in *Homer Ramsdell,* but the Court focused upon the relationship of the pilot to the ship. Of course, Jones Act rights depend, according to the *McDermott* case, only upon the existence of a "connection to a *vessel* in navigation." 499 U.S. at 355. Emphasis added.

the anomalous result that the most important navigator aboard the vessel is not given the same personal injury remedies as the lowest-rated deck hand or dishwasher. This result is based upon the rather unsatisfying "permanency or substantial work" test which apparently requires some minimum term of employment.

The personal injury remedies left available to a pilot in the Fifth Circuit are not altogether clear. The plaintiff in *Bach* had, for example, asserted a claim in terms of the general maritime law warranty of seaworthiness, which claim cannot be asserted by workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905. (A-60). The Fifth Circuit recognizes that maritime workers on the navigable waters of the United States ought to be covered by either the LHWCA or the Jones Act. See *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 n.2 (5th Cir. 1980) ("seaman" and "member of crew" are interchangeable terms). However, the *Bach* court was plainly perplexed by the situation presented by the compulsory pilot: "The LHWCA covers those 'engaged in maritime employment'. 33 U.S.C. §§ 902(3), 903. The record does not clearly show that Bach was the employee of anyone. It is, therefore, unclear whether the LHWCA covered him." 920 F.2d at 327 n.5.

Undaunted by the fact that state-licensed pilots have no employers other than those who own or operate the ships upon which they work, the Fourth Circuit has specifically held that pilots are "maritime workers" covered by the LHWCA. This conclusion led to the determination that pilots are barred by the LHWCA from asserting an action for unseaworthiness against the shipowner. *Harwood v. Partredereit A.F. 15.5.81,* 944 F.2d 1187 (4th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 1265 (1992). Employing a very broad construction of the LHWCA and the amplifying Supreme Court precedent, the Fourth Circuit held that because he was injured upon navigable waters, the pilot, irrespective of the nature of his job duties, must have been

intended by Congress to be limited to compensation benefits under the LHWCA. 944 F. 2d at 1190-91. As pointed out by the dissenting judge, the *Harwood* decision directly contradicts the determination made by the Employee's Compensation Commission in 1927 (see n.3, *supra*) that pilots are not covered by the LHWCA, which decision is to be given pre-eminent authoritative weight per *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1939). 944 F.2d at 1194 (Ervin, C.J., dissenting.) At bottom, the *Harwood* decision fails to properly recognize that pilots are quintessential seamen. Most importantly, because pilots have no other employers but the owner/operator of the vessel being piloted, the LHWCA compensation scheme provides absolutely no benefit for them.

This last point was made by the court in *Clark v. Solomon Navigation Ltd.,* 631 F. Supp. 1275, 1283 (S.D.N.Y. 1986). The *Clark* court arrived at yet another conclusion as to the causes of action available to the pilot. Chief Judge Motley held that the Jones Act was not applicable, the pilot not being "permanently" attached to any particular vessel, but that the pilot was undeniably engaged in seaman-like work. Asserting that the doctrine of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), had retained its vitality *vis-a-vis* those persons not falling within the ambit of the LHWCA, the *Clark* court concluded that river pilots are entitled to the warranty of seaworthiness.

Finally, in *Ringering v. Compania Maritima De-La-Mancha,* 670 F. Supp. 301 (D. Or. 1987), *aff'd mem.,* 848 F.2d 1243 (9th Cir. 1988), the Ninth Circuit Court of Appeals affirmed a district court decision which had squarely held that river pilots were entitled to the protection of both the Jones Act and the warranty of seaworthiness.

In summary, the jurisprudence with respect to the personal injury remedies owing to a pilot is in total chaos. In the Ninth Circuit, pilots enjoy the protection of the Jones Act and the warranty of seaworthiness; in the

Fourth Circuit, they are entitled to neither, but are harbor workers without benefits. In the Second Circuit, pilots do not receive Jones Act protection but they are entitled to the warranty of seaworthiness. In the Fifth Circuit a pilot is not a "seaman", is therefore not entitled to recover under the Jones Act, may or may not be a harbor worker and may or may not have a warranty of seaworthiness. In the Third Circuit a pilot is not entitled to the Jones Act whether he/she qualifies as a "seaman" or not. Depending upon the forum selected, a pilot could be a Jones Act seaman, a *self-employed* LHWCA employee, or a "*Sieracki* seaman."

Although the sheer numbers of pilots in the United States is not great, the importance of this class of mariner to the country's water-borne commerce and of this issue to this class of seaman cannot be overstated. The time and judicial resources expended by this Court toward establishing a uniform rule to cover pilots will be well spent.

2. This case squarely presents the critical issue *vis-a-vis* Jones Act entitlement left undecided in this Court's jurisprudence, to wit, the requisite nature and scope of the "employment-related connection" between the worker and a vessel.

In *McDermott International, Inc. v. Wilander*, *supra*, it was recognized that this Court's prior decisional law pertaining to Jones Act entitlement had "led the lower courts to a 'myriad of standards and lack of uniformity in administering the elements of seaman status' ", creating a legal labyrinth in which the lower courts were lost. 498 U.S. at 353. In *McDermott,* the specific holding was that the plaintiff need not have been directly engaged in the navigation of a vessel in order to qualify as a Jones Act seaman. This made it clear that so long as a claimant had an "employment-related connection to a vessel in navigation", he or she was entitled to the Jones Act remedy. The *McDermott*

decision recognized some residual ambiguity, however. "The key to seaman status", wrote Justice O'Connor on behalf of the unanimous Court, "is employment-related connection to a vessel in navigation. *We are not called upon here to define this connection in all details,* but we hold that a necessary element of the connection is that a seaman perform the work of a vessel." 498 U.S. at 355 (emphasis added).

The case now before the Court, that of a state-licensed pilot's suit against the owner/operator of a vessel engaging his services, cries out for a uniform definition of the "details" of the employment-related connection. The circuit courts are in disagreement as to the nature and length of the employment relationship required for Jones Act "seaman" status.

The petitioner in this case came aboard the vessel for the sole purpose of navigating it in exchange for pay, and had no employer other than the defendant vessel owner. Based upon those facts, the district court found that the requisite "employment-related connection to a vessel" existed. In its decision in *Bach,* the Fifth Circuit required a showing that the claimant had a "permanent attachment to or substantial work on a vessel or identifiable fleet of vessels." 920 F.2d at 324. The *Bach* court refused to make an exception to that test for the worker, such as a pilot, whose work is entirely navigation-oriented. 920 F.2d at 326. However, other courts have held that so long as the claimant was employed aboard a vessel in navigation in furtherance of that vessel's purpose, the length of time of his service is irrelevant. *See, e.g., Weiss v. Central Railroad Co.,* 235 F.2d 309 (2d Cir. 1956).

The late Judge John R. Brown, former Chief Judge of the Fifth Circuit Court of Appeals, wrote a provocative dissent to the decision of the panel in *Bach v. Trident Steamship Co.* He pointed out that the "more or less permanent connection" element of the Jones Act test had crept into the Fifth Circuit's jurisprudence in response to the problems inherent in classification of the

numerous types of job descriptions found in the offshore oil industry. 920 F.2d at 333, (Brown, C. J., dissenting). Judge Brown argued in his *Bach* dissent that the pilot, as the quintessential seaman, was a critical member of the ship's complement, irrespective of the length of time of his employ or the manner in which he was paid.[7]

Although many circuits have incorporated the "more or less permanent attachment" test, others have not. Prior to the instant case, the Third Circuit Court of Appeals had placed a foot in each camp. In its decisions in *Griffith v. Wheeling-Pittsburgh Steel Co.,* 521 F.2d 31 (3d Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976), and *Mach v. Pennsylvania Railroad Co.,* 317 F.2d 761 (3d Cir. 1963), the Third Circuit essentially defines a sliding scale depending upon the nature of the claimant's work.

In *Mach v. Pennsylvania Railroad Co.,* the plaintiff's job was to go aboard coal barges stationed at his employer's pier and, utilizing winches and mooring lines, move the barges along the pier for discharge. The owners of the barges upon which he worked were not identified in the case, but it was clear that the claimant had no definite or permanent connection with any barge or group of barges.[8] The *Mach* court held, nevertheless,

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7. Judge Brown actually wrote two dissenting opinions in *Bach.* In response to a Petition for Writ of Certiorari, the Fifth Circuit was directed to reconsider *Bach* in light of the then-recent *McDermott* decision. 499 U.S. ___, 1991 AMC 2701 (June 3, 1991). Unlike the panel's majority, Judge Brown saw that *McDermott* contained a great deal of language in support of a pilot's Jones Act status. *Bach v. Trident Steamship Co.,* 947 F.2d 1290 (5th Cir. 1991), *cert. denied,* 504 U.S.___, 112 S.Ct. 1996 (1992) (Brown, C.J., dissenting).

8. In *Mach,* the plaintiff was deemed to have a Jones Act remedy against his employer, Pennsylvania Railroad Co., which was the owner of a waterfront terminal. Critical to this determination was the fact that the plaintiff worked aboard vessels docked at the terminal, but it is curious that the court paid absolutely no attention to whether or not plaintiff's employer owned or controlled these vessels.

that the claimant was entitled to sue under the Jones Act, stating that:

> The duration of service for and upon a vessel may determine whether shipboard work which is not normally performed by a ship's company makes the worker a crewman, but lack of long continued attachment to the vessel cannot, as a matter of law, serve to deny seaman's status under the Jones Act to an employee who is injured while assigned to and performing normal crew service.

317 F.2d at 763-64.

In so holding, the court cited the Second Circuit's decision in *Weiss v. Central Railroad,* 235 F.2d 309 (2d Cir. 1956), in which that court had stated that it knew of no instance in which a worker whose job it was to actually steer and navigate a vessel had been denied Jones Act protection merely because the duration of his service was short.

In *Griffith v. Wheeling-Pittsburgh Co., supra*, however, the Third Circuit distinguished *Mach* in a case where the plaintiff, a member of the steel company's labor pool, had been temporarily assigned docktender duties which required him to go aboard barges from time to time. The plaintiff in *Griffith* was never engaged in vessel maneuvering and spent as much or more time working at jobs within the mill as he did alongside the dock.

In the case at bar, the Third Circuit seemed to recognize that its prior decisions had placed it inside a jurisprudential box of sorts. The court realized that a strict application of *Mach* might have required a finding of Jones Act entitlement, but the court avoided the application of *Mach* by examining in some detail the nature of the relationship between a pilot and an employing vessel owner. (A-15). In spite of this Court's admonition in *Cosmopolitan Shipping Co. v. McAllister* that "Congress intended that the purposes of [the Jones Act] should not be restricted by common-law concepts of

control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality part of the processes and dependent upon the businesses to which they rendered service", 337 U.S. at 790, the Third Circuit applied the general rules of agency or vicarious liability to the *Evans* case. (A-15).

Without entering a full discussion of the merits at this juncture, it can be said that although the pilot's relationship to the vessel is somewhat unique, the case at bar presents an important opportunity to define the nature of the requisite "employment-related connection". Is it appropriate, for example, to utilize a common law master/servant test when the issue is the breadth of beneficent legislation as opposed to the limits of vicarious liability to third persons? Of what import is the duration of the connection? Captain Evans was aboard the defendant's vessel for nearly eight hours; it is quite common for shipowners to hire "night mates", temporary officers who are hired out of the local union hall, to stand in-port watches. Why would the pilot, who is arguably more important to the vessel and has less control over his working conditions, be deserving of less protection? Should not the nature of the claimant's shipboard work have a bearing on the question, as the Third Circuit cases suggest?

Given the tack taken by the Third Circuit in the instant case, a number of important questions are brought to the fore pertaining to the identification of the appropriate Jones Act defendant. The presumption among the circuits is that a Jones Act claimant can sue only his "employer" and that he can have only one such "employer".[9] The eminent admiralty law scholars, Pro-

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9. *See, e.g., Haskins v. Point Towing Co.*, 421 F.2d 532, 536 (3d Cir.), *cert. denied*, 400 U.S. 834 (1970), in which the Third Circuit dismissed an action filed by an illiterate tugboat captain who had made a mistake in selecting between two related corporations.

fessors Grant Gilmore and Charles L. Black, Jr., have directly challenged these presumptions. In discussing the identity of the appropriate Jones Act defendant, Gilmore and Black begin as follows:

> In the normal situation the Jones Act defendant is a) the plaintiff's employer, and b) the operator of the ship on which the plaintiff was injured. Suppose, however, that the employer has no control over the operation of the ship (the Jones Act being restricted to injuries caused by operating negligence.) Can the operator be sued under the Jones Act although he is not the plaintiff's employer? Alternatively, can the employer be sued under the Jones Act although he does not operate the ship? And, if the non-operating employer can be sued under the Jones Act, is he liable only for his own negligence or is he liable for the operator's negligence as well? The Jones Act case law does not clearly answer any of these questions.

Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty* § 6-21(a) at 335 (2d ed. 1975).

Gilmore and Black go on to discuss the Second Circuit's decision in *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973), which had grappled with the proposed questions in concluding that a hairdresser, who worked in a ship-board shop operated by her employer, a concessionaire, could not sue the shipowner under the Jones Act. Gilmore and Black then comment:

> There are a great many maritime workers who qualify as "seamen" and who suffer work-related injuries on vessels operated by persons who may not be, technically, their employers. The issues warrant further analysis — in particular, the basic holding in *Mahramas* that Jones Act actions can be brought only against an "employer" and that the plaintiff can have only one employer at a time.

> According to Judge Anderson's *Mahramas* opinion, "there has never been any question that the Jones Act applies only between employees and their employers." That proposition has, indeed, been repeated hundreds, if not thousands, of times in judicial opinions and in the academic literature. On the other hand, nothing about the Jones Act is either true or false until the Supreme Court has held it to be so. *Cosmopolitan Shipping Co. v. McAllister* is regularly cited as having so held.

Gilmore and Black, *supra,* at 336-37.

Cosmopolitan Shipping arose in a wartime context in which ships had been commandeered by the United States government and crewmen had signed papers indicating that the government was to be their "employer". Mr. McAllister apparently desired a jury trial and, therefore, brought his case instead against the ship's former owner, Cosmopolitan. Cosmopolitan retained, as "general agent", a considerable amount of administrative responsibility with regard to the ship's operation. In deciding the case, Justice Reed first noted that the U.S. Government was the plaintiff's technical employer, but nonetheless pursued a lengthy discussion of the responsibilities of Cosmopolitan *vis-a-vis* shipboard operating conditions. According to Gilmore and Black:

> What *McAllister* comes down to is that Cosmopolitan could not be sued under the Jones Act because a) it was not McAllister's employer **and** b) it was not the operator of the ship. *McAllister* (which was a 5-4 decision) tells us nothing about what the Supreme Court majority might have held if it had concluded that Cosmopolitan, although not the employer, was the operator. Thus, Justice Reed's remarks about the employment relationship rank as dictum and his lengthy demonstration of the fact that Cosmopolitan did not operate the ship (but merely "managed a certain shoreside business") suggests that even the

> *McAllister* majority regarded the question as open and unsettled. And if *McAllister* did not hold that the Jones Act defendant must be the plaintiff's one and only employer (which it did not), then no other Supreme Court case comes even close to establishing that proposition.
>
> The Jones Act was designed to remove the bar created by the fourth proposition in *The OSCEOLA* [citation omitted] and to allow seamen to recover damages for work-related injuries caused by shipboard negligence. On policy grounds, there seems to be no good reason for limiting the recovery to actions against "employers"; this is particularly true in light of the fact that the action for unseaworthiness, which has become the identical twin of the Jones Act action, is not so limited. The longstanding assumption that the only possible Jones Act defendant is the plaintiff's one and only employer should be reconsidered. As Judge Oakes' *Mahramas* dissent suggests, there are two ways of going about this reconsideration. One is to conclude that in *Mahramas*-type situations, the plaintiff has two employers: at least for purposes of the Jones Act, there is no reason why a seaman cannot serve two masters. The other is to conclude that Jones Act liability rests essentially on control of the ship's operation and not on the employment relationship – an approach which the *McAllister* case certainly leaves open.

Gilmore and Black, *supra*, at 338-39 (emphasis added; footnotes omitted).

It is time for this Court to address the issues posed by Professors Gilmore and Black in 1975 and presented now in this case.

Aside from the academic authorities, this Court has itself held that a shipowner's liabilities to one who acts as a seaman aboard his vessel arise irrespective of the

existence of any contractual-type employment relationship. In *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), a shipowner was held to be liable to a longshoreman under the doctrine of unseaworthiness. It was there held, endorsing the analytical approach taken in *International Stevedoring Company v. Haverty,* 272 U.S. 50 (1926), that it is not an employer/employee relationship which gives rise to the shipowner's duties, but the control which the shipowner has over the shipboard working environment. The court was discussing the warranty of seaworthiness in *Sieracki,* but the rationale used to reject the arguments of the shipowner was born in the *Haverty* case, which had allowed Jones Act protection to a longshoreman working aboard ship. A strong argument can be made that the precedential effects of *Sieracki* and *Haverty* survive to this day, notwithstanding the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, for those workers who, like Captain Evans, fall outside the scope of the LHWCA.

There has never been any contest of the fact that United Arab, the defendant below, controlled the shipboard conditions to which the petitioner was subjected. Captain Evans was not merely a visitor or business invitee aboard the vessel. He had a definite and important employment-related connection to defendant's vessel. He was a seaman, and as such was entitled to the protection of the Jones Act. He was undoubtedly injured "in the course of his employment aboard the vessel" and is deserving of a recovery against the ship's operator whether or not a common law master/servant relationship existed between them. This Court should issue the requested Writ in order to decide these issues.

CONCLUSION

Left unreviewed, the decision of the United States Court of Appeals for the Third Circuit leaves continuing confusion in the maritime law on the status of pilots. The various circuit courts have held pilots to be harbor workers, to be maritime workers who are neither Jones Act seamen nor harbor workers, to be maritime workers entitled to the protection of the warranty of seaworthiness, or not so entitled, depending on the court. There is neither certainty nor consistency about the nature or the scope of the requisite employment related connection for Jones Act status. The purpose for which the Jones Act was passed, the protection of American seafarers, upon whom the mercantile commerce and the defense of the nation depends, will continue to be frustrated. The Writ of Certiorari should be granted and the decision of the Court of Appeals for the Third Circuit reviewed to effect a resolution of this unsatisfactory situation.

Respectfully submitted,

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